

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE DISTRICT REGISTRY OF BUKOBA
AT BUKOBA**

CRIMINAL APPEAL NO. 42 OF 2021

(Originating from criminal case No. 152 of 2021 of the District Court of Biharamulo)

BIZIMANA DEOGRATIAS.....1ST APPELLANT
STANSLAUS KANYEHALA.....2ND APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

18th November & 23rd November 2021

Kilekamajenga, J.

The two appellants in this case were arraigned for the offence of cattle theft before the District Court of Biharamulo. Being aggrieved with the decision of the trial court, they appeared before this Court seeking justice. Their petition of appeal contained five grounds of appeal coached thus:

- 1. That, the Trial Court erred both in fact and in law to hold that the prosecution proved the case against the appellants beyond reasonable doubt whereas not.*
- 2. That, the trial Court misdirected itself by dealing with the prosecution evidence on its own that it was true and reliable thereby arriving at the conclusion without proper consideration of the defence evidence thereby failing to consider the whole adduced evidence by both sides, the prosecution and defence.*



3. *That, the trial Court misdirected itself to convict the appellants based on the alleged compensation of 9 heads of cattle being considered by the Court to be tantamount to admitting the commission of the offence whereas the purported handing over process of the cattle to PW1 was done under police coercion/intimidation and threats a situation which led to the 2nd appellant to complain to the OC – CID Biharamulo District who ordered the restoration to the 2nd appellant his deprived cattle.*
4. *That, the trial Court erred both in fact and in law to hold that the caution statement 9Exhibit P1) by the 1st appellant was corroborated by the 2nd appellant's payment of 9 cows to PW as compensation whereas not.*
5. *That, the trial Court erred both in law and in fact to admit and rely on exhibit P1 (Caution statement) which was illegally and forcefully obtained by torturing and threatening the 1st appellant who generated fabricated and contradictory statements.*

The parties finally appeared before the court to argue the appeal. The appellants enjoyed the legal services of the learned advocate, Mr. Raymond Laurent whereas the learned advocate, Mr. Joseph Mwakasege appeared for the respondent, the Republic. The counsel for the appellants moved the court with an argument that, it was erroneous to convict the appellants on the offence of cattle theft while the same offence was not proved. He argued further that, first



and foremost, the offence of cattle theft was not stated in the charge. The appellants were charged under **section 258(1) and 268(3) of the Penal Code, Cap. 16 RE 2019**. Section 258(1) defines the offence whereas section 268(3) defines the animals capable of being stolen. As the offence was not disclosed in the charge, the trial was therefore unfair and the charge did not support the conviction. The counsel referred the court to the case of **Marekano Ramadhani v. the Republic, Criminal Appeal No. 202 of 2013**, CAT at Arusha (unreported).

Furthermore, the evidence adduced during the trial did not support the offence of cattle theft; the trial court based its conviction on the appellants' caution statement. Moreover, the evidence of the co-accused was not supposed to be taken without corroboration. He supported his argument with the case of **Bushiri Amiri v. R. [1992] TLR 65** and also referred the court to **section 33(2) of the Evidence Act, Cap. 6 RE 2019**.

Mr. Laurent further averred that, the trial magistrate only evaluated the evidence from the prosecution side while leaving behind the defence evidence. He argued that, the court must weigh the evidence from both sides as it was stated in the case of **Yusuph Aman v. the Republic, Criminal Appeal No. 255 of 2014**, CAT at Mbeya (unreported). He finally urged the court to re-evaluate the

evidence adduced during the trial. The counsel was of the view that, the trial court based its conviction on hearsay evidence because there is no proof whether the cows were real stolen.

On his part, the learned State Attorney also urged the court to re-evaluate the evidence and make a judicious decision in this case.

In this appeal, the most important issue for determination is whether or not the prosecution proved its case to the required standard. This point was raised by the appellants in the grounds of appeal. To answer this question, it is pertinent to re-evaluate the evidence adduced during the trial. In this case, the prosecution had five witnesses. PW1 who was the owner of the alleged stolen cattle stated that, his nine cattle with a mark of MB were stolen on 16-17th June 2020. He reported the incident at Nyakahura police station and was given a letter to search for the cows. Later, the 1st accused was arrested suspected of stealing the cattle; he also mentioned his accomplices. The 2nd appellant agreed to compensate him the stolen cattle and on 17th June 2020. Finally, PW1 was compensated his nine cattle. According to PW1, the payment of cattle was done in the presence of the hamlet chairman and other village leaders. However, the 2nd appellant complained to the responsible authorities about the compensated cattle and the cattle were taken back to the owner from PW1 on the allegation that he took them illegally.



On his part, PW2 witnessed the 2nd appellant giving nine cows to PW1 but he did not know why the 2nd appellant gave nine cows to the 2nd appellant though he was aware that PW1 previously lost nine cattle. PW3 was the police officer who interrogated the suspects about the offence of cattle theft. In the interrogation, the 1st appellant admitted to have stolen the cattle. The 1st appellant's caution statement was admitted and read in court. PW3 also participated in arresting other suspects including Mapinduzi Dotto and Clemence. Upon interrogation, the suspects mentioned the person who hired them for cattle theft. The 2nd appellant agreed to compensate the stolen cattle to PW1. This act made PW3 believe that the 2nd appellant stole the cattle. PW3 also witnessed the handing of the nine cattle to PW1 from the 2nd appellant.

PW4 who was the hamlet chairman was informed about the cattle theft on 17th June 2020. He witnessed when the 2nd appellant gave nine cows to PW1. He also witnessed when the cattle were returned to the 2nd appellant. However, PW4 was not able to say anything about the cattle theft because he never witnessed the stealing. PW5 was one of the police officers who received information about the cattle theft; he was later informed that the 1st appellant was involved in the cattle theft. When the 1st appellant was arrested, he admitted to have stolen the cattle while assisted with Faustine and James and other persons.

In his defence, the 1st appellant simply denied being involved in cattle theft. On his part, the 2nd appellant narrated on how he was arrested, forced to admit the offence and compensate PW1. In his testimony, he finally agreed to compensate the cattle and later realised that the compensation was done unjustly and therefore reported the matter to the OC-CID of Biharamulo and the cattle were finally returned to him.

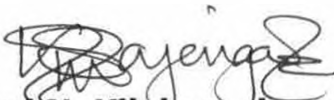
Now by considering the evidence at hand, it is evident that most of the evidence does not point towards the appellants stealing the cattle. The only evidence available that links the appellants to the offence of cattle theft is the 1st appellant's caution statement. In the statement, the 1st appellant mentions the 2nd appellant. However, the 1st appellant was never taken to the justice of peace for an extra judicial statement to establish further whether she wilfully gave the statement before the police. On the other hand, there is no sufficient evidence to prove that the 2nd appellant ever stole the cows apart from the evidence he agreed for his cows to be taken by PW1 as compensation for the stolen cattle. He later reported the incident to the OC CID of Biharamulo and the cows were later returned to him. I real find a very weak evidence to sustain the conviction against the appellants on the offence of cattle theft. I find a lot of gaps of evidence that were not filled by the prosecution's evidence. I allow the appeal and order the appellants to be discharged forthwith unless held for other lawful reasons.



DATED at BUKOBA this 03 day of December, 2021.

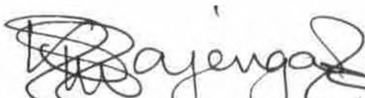


Court:


Ntemi N. Kilekamajenga.
JUDGE
03/12/2021

Judgment delivered this 03rd December 2021 in the presence of the appellants and Mr. Danstan Mujaki holding brief for advocate Raymond Laurent for the appellants. The learned State Attorney, Mr. Joseph Mwakasege.




Ntemi N. Kilekamajenga.
JUDGE
03/12/2021

